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DATUK JOHARI ABDUL GHANI & ORS

v.

QSR BRANDS BHD & ORS

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COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
GHAZALI MOHD YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
[APPEAL NOS: W-02-1070-2005 & W-02-1095-2005]

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4 MAY 2006

COMPANY LAW: *Meetings - Adjournment - Whether decision by Chairman to adjourn meeting valid - Whether Chairman acted under company's Articles of Association in adjourning meeting - Whether*

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common law power of adjournment properly exercised - Whether decision to adjourn unreasonable - Whether continuation of meeting by requisitionists competent and business transacted thereat valid

CIVIL PROCEDURE: *Injunction - Interim injunction - Cases in which grant or refusal of an injunction would terminate litigation one way*

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or other - Whether must satisfy a higher threshold than American Cynamid test of "serious question to be tried" - Whether court could grant applicant at interlocutory level full relief sought to be secured at final hearing

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There were two appeals in the present instance, they being Civil Appeals W-02-1070-05 ('first appeal') and W-02-1095-05 ('second appeal') respectively. The first appeal was directed against the decision of the High Court granting an injunction for the respondents in the following terms: that until the declaration of

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the result of the poll pursuant to art. 74 of the Articles of Association ('art. 74') of the 1st plaintiff ('QSR'), the 1st to 5th defendants (the appellants in the first appeal) be restrained from acting upon any and all purported resolutions passed, including without limitation the resolutions pertaining to the removal of the

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nine directors, at the purported Extraordinary General Meeting of QSR held on 20 September 2005. The second appeal was directed against the refusal of the High Court to grant an injunction prayed for in the following terms: that the defendants (respondents in the second appeal) be restrained from acting as

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Chairman and/or directors of QSR, and from otherwise intermeddling or interfering in QSR's business or management's affairs until the final disposal of this originating summons.

QSR was a public listed company and on 22 August 2005, a special notice of a resolution moved pursuant to s. 145 of the Companies Act 1965 was given by requisitionists. The resolutions sought to be moved at the meeting were in respect of the removal of certain directors. The third respondent in the first appeal ('third respondent') was appointed Chairman of that meeting and it was a fair inference that all present knew the terms of the resolutions that were being moved. In particular, the third respondent must have known about the proposed resolution seeking his removal as a director of QSR. At the meeting, a poll was demanded and granted, and counting of the votes took place. The third respondent then adjourned the meeting pursuant to art. 74. The undisputed evidence showed that the meeting then proceeded, conducted by those remaining behind. Results were announced and the resolutions were carried; in effect, all the respondents in the second appeal were removed as directors. Both sides of the dispute then filed proceedings. The issue common to both appeals was whether the decision by the third respondent to adjourn the meeting was valid. If it was, then it followed that the meeting that continued was unlawful and the resolutions thereat were improperly carried, and that the learned judge was correct in granting the injunction aforesaid.

Held (allowing the appeals)
Per Gopal Sri Ram JCA:

(1) Article 72 of QSR's Articles of Association did not apply to this case because the third respondent did not seek the consent of the meeting to adjourn it. That only left art. 74, the critical words in that article being "adjourn the meeting to some place and time fixed for the purpose of declaring the result of the poll". Looking at the affidavit evidence presented to the learned judge and read to this court by counsel on both sides, it was a fair inference that the third respondent did not adjourn the meeting for the purpose of declaring the result of the poll that had been conducted. As may be gathered from the affidavit evidence, the quarrel or uncertainty about the defective proxies was *de minimis*. The votes relating to the disputed proxies, and it was common ground, would not have affected the final result. That being the case, the third respondent's assertion that he acted under art. 74 could not hold water. Therefore, he was exercising his common law power of adjournment which he of course had as Chairman of the meeting. (paras 11 & 12)

(2) The correct approach to determine whether the common law power of adjournment has been properly exercised in a given case is that set out by the English Court of Appeal in *Byng v. London Life Association*. Turning to the evidence, it was quite apparent that the third respondent failed to take into account relevant considerations. In particular, he should have but did not ask himself the question whether the two defective forms he was shown by the scrutineers would have made a difference on the vote upon the resolutions before the meeting. There was one further point. The third respondent had an interest in at least one of the resolutions, namely that which sought his removal. In these circumstances, the decision to adjourn was unreasonable in the sense explained in *Byng (supra)*. Thus, the third respondent's decision to adjourn being invalid, it followed that the continuation of the meeting by the requisitionists was competent and that the business transacted thereat was valid. (para 13, 14, 15, 16 & 17)

(3) In the ordinary case of an application for an interim injunction, whether mandatory or prohibitory, the test is whether there is a serious question to be tried. If there is, and no injustice would be occasioned by the grant of the injunction, then the balance of convenience would ordinarily lie in favour of the grant of the injunction. This in reality is a paraphrase of Lord Diplock's seminal dictum in *American Cynamid Co v. Ethicon*. However, cases, although rare, may arise where the grant or refusal of an injunction would terminate the litigation one way or the other. In such cases, the *American Cynamid* test of "serious question to be tried" does not apply. The plaintiff seeking an injunction in those circumstances must satisfy a higher threshold. This is sometimes referred to as a *prima facie* case or a strong "*prima facie* case" or "an unusually sharp and clear case". Whether a high degree of assurance is felt by a court in a case falling outside the *American Cynamid* test depends on the facts and circumstances of each case. The stronger, the more credible, the evidence, the greater the assurance that will be felt. And that was indeed the position here on the instant facts. (para 19)

(4) The other point taken was that if the appeals were allowed, it would mean granting the appellants the whole of the relief that they had claimed. But that was not unusual and had happened before. In *Gibb & Co v. Malaysia Building Society Bhd,* Abdoolcader J, when repelling a submission that it would be unjust to grant an order that would virtually give the plaintiff the full relief sought for at the interlocutory level, said that the court was not precluded from granting an interlocutory injunction where this would virtually give the applicant therefore on his claim the full relief actually sought to be secured at the final hearing when the matter is viewed on a balance of convenience. If there was plainly no defence to the action, and the only object in raising a defence was delay, an injunction should be issued even if it gave the applicant his whole remedy before the trial. (para 20)

(5) Upon careful consideration and scrutiny of the objective facts and evidence in this case, it was concluded that this was a case in which no reasonable tribunal properly directing itself on the facts and applicable law would have made the orders that were made by the High Court in these appeals. (para 24)

[Injunction granted on 5 October 2005 in Civil Appeal W-02-1070-05 hereby dissolved forthwith; in Civil Appeal W-02-1095-05, there should be an order in terms of prayer (a) of summons in chambers dated 21 September 2005 upon the usual undertaking as to damages.]

Bahasa Malaysia *translation of headnotes*

Terdapat dua rayuan dalam kes semasa, iaitu Rayuan Sivil W-02-1070-05 ('rayuan pertama') dan Rayuan Sivil W-02-1095-05 ('rayuan kedua'). Rayuan pertama adalah terhadap keputusan Mahkamah Tinggi kerana membenarkan permohonan injunksi responden-responden seperti berikut: bahawa sehingga keputusan pengundian yang dibuat di bawah per. 74 Perkara-perkara Persatuan ('per. 74') plaintif pertama ('QSR') diisytiharkan, defendan-defendan pertama hingga kelima (perayu-perayu dalam rayuan pertama) adalah dihalang dari melaksanakan sebarang resolusi yang diambil semasa Mesyuarat Am Luarbiasa QSR yang diadakan pada 20 September 2005, termasuk resolusi berkaitan dengan pemberhentian sembilan orang pengarah-pengarahnya. Rayuan kedua adalah dituju kepada keengganan Mahkamah Tinggi memberikan perintah injunksi yang dipohon seperti berikut: bahawa defendan-defendan (perayu-perayu dalam rayuan kedua) dihalang

dari bertindak sebagai Pengerusi dan/atau pengarah, atau campur tangan dalam apa jua urusan dan pengurusan QSR sehinggalah saman pemula di sini diputuskan.

QSR adalah sebuah syarikat tersenarai di mana, pada 22 Ogos 2005, suatu notis resolusi di bawah s. 145 Akta Syarikat 1965 telah diberi oleh pihak requisitionists. Resolusi yang hendak diambil pada mesyuarat adalah berkaitan dengan pemberhentian beberapa pengarahnya. Responden ketiga dalam rayuan pertama ('responden ketiga') telah dilantik sebagai Pengerusi mesyuarat tersebut dan adalah boleh dianggap bahawa semua yang hadir mengetahui tentang resolusi-resolusi yang dicadangkan. Secara khusus, responden ketiga mengetahui tentang cadangan resolusi untuk memberhentikan khidmatnya sebagai pengarah QSR. Di mesyuarat tersebut, satu pengundian telah dijalankan dan pengiraan undi dibuat. Responden ketiga bagaimanapun menangguhkan mesyuarat di bawah per. 74. Walaupun begitu, mesyuarat telah disambung oleh mereka yang tinggal. Berikutnya, keputusan telah diumumkan dan resolusi dilaksanakan, berakibat, kesemua responden di dalam rayuan kedua telah disingkir sebagai pengarah. Kedua-dua pihak kepada pertikaian kemudian telah memfail prosiding mereka masing-masing. Isu sama yang berbangkit dalam kedua-dua rayuan adalah sama ada keputusan responden ketiga menangguhkan mesyuarat di atas sah. Jika penangguhan tersebut sah, maka ianya mengikut bahawa mesyuarat yang disambung semula adalah tak sah, yang bermakna bahawa resolusi-resolusi yang dilaksanakan berikutnya adalah tidak teratur dan yang arif hakim betul bilamana membenarkan perintah injunksi di atas.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Gopal Sri Ram HMR:

(1) Perkara 72 Perkara-Perkara Persatuan QSR tidak terpakai kepada kes di sini kerana responden ketiga tidak meminta persetujuan mesyuarat untuk membuat penangguhan. Maka yang tinggal adalah per. 74, di mana bahagian pentingnya adalah bahagian yang menyatakan "menangguhkan mesyuarat ke lain tempat dan masa yang ditetapkan untuk tujuan mengisytiharkan keputusan pengundian". Melihat kepada keterangan afidavit yang dikemukakan kepada yang arif hakim dan yang dibaca di mahkamah ini oleh peguam kedua-dua pihak, anggapan boleh dibuat bahawa responden ketiga tidak menangguhkan mesyuarat untuk tujuan mengisytiharkan

keputusan pengundian yang dijalankan. Seperti yang boleh dilihat dari keterangan afidavit, pertelingkahan atau ketidaktentuan mengenai proksi cacat adalah *de minimis.* Undi-undi berkaitan proksi cacat, dan ini adalah diakui, tidak akan menjejaskan keputusan terakhir. Dalam keadaan sedemikian, pengataan responden ketiga bahawa beliau bertindak di bawah per. 74 adalah tidak berasas. Oleh itu, beliau sebenarnya telah melaksanakan kuasa menanggung common law, yang sememangnya beliau miliki selaku Pengerusi mesyuarat.

(2) Pendekatan yang betul bagi menentukan sama ada kuasa common law untuk menangguh dilaksanakan dengan teratur telah dikupas oleh satu kes Mahkamah Rayuan Inggeris iaitu dalam kes *Byng v. London Life Association*. Menoleh kepada keterangan, adalah agak ketara bahawa responden ketiga gagal mengambilkira pertimbangan-pertimbangan relevan. Khususnya, beliau sepatutnya bertanya dirinya sama ada dua borang cacat yang ditunjukkan kepadanya oleh peneliti-peneliti boleh menjejaskan pengundian terhadap resolusi-resolusi yang hendak diambil, tetapi ini tidak dibuat oleh beliau. Seperkara lagi, responden ketiga mempunyai kepentingan sekurang-kurangnya dalam satu daripada resolusi-resolusi berkenaan, iaitu resolusi untuk menyingkirkan beliau. Dalam keadaan ini, keputusan untuk menangguh adalah tidak munasabah menurut kaedah yang djelaskan di dalam *Byng (supra)*. Maka itu, keputusan responden ketiga untuk menangguh mesyuarat adalah tak sah. Ianya mengikut bahawa penyambungan mesyuarat oleh requisitionists adalah berkompeten dan begitu juga dengan segala urusan yang dilaksanakan mereka di situ.

(3) Dalam kes biasa permohonan injunksi interim, sama ada yang berbentuk mandatori atau prohibitori, ujiannya adalah sama ada terdapat persoalan serius yang perlu dibicarakan. Jika persoalan sedemikian wujud, dan tiada ketidakadilan akan berlaku jika injunksi diberi, maka imbangan keadilan biasanya akan berpihak kepada keputusan untuk membenarkan injunksi. Ini pada hakikatnya adalah mengulangi dikta awal Lord Diplock di dalam *American Cynamid Co v. Ethicon*. Apapun, kes-kes mungkin berbangkit, walau sejarang mana sekalipun, di mana pemberian atau penolakan injunksi akan menyebabkan litigasi secara berkesannya akan berakhir. Dalam kes-kes sebegitu, ujian "persoalan serius untuk dibicarakan" *American Cynamid* adalah tidak terpakai. Mana-mana plaintif yang memohon injunksi

dalam keadaan sedemikian harus berdepan dengan halangan yang lebih tinggi. Ini kadang kala dirujuk sebagai suatu kes *prima facie* atau suatu "kes *prima facie*" yang kukuh atau "suatu kes yang luarbiasa tajam dan jelasnya". Bagi kes-kes yang tidak dirangkum oleh ujian *American Cynamid*, sama ada keyakinan yang tinggi dapat dirasakan oleh mahkamah akan bergantung kepada halkeadaan sesuatu kes. Lebih kukuh dan lebih boleh dipercayai keterangan yang ada, maka lebih kuatlah rasa keyakinan itu. Berdasarkan fakta, itulah keadaannya yang wujud di sini.

(4) Seperkara lagi yang patut diberi perhatian ialah sekiranya rayuan-rayuan dibenarkan, ianya bererti membenarkan keseluruhan relif yang dituntut oleh perayu-perayu. Tetapi itu bukan sesuatu yang luar biasa dan memang pernah berlaku sebelum ini. Dalam *Gibb & Co v. Malaysia Building Society Bhd*, Abdoolcader H, ketika menolak hujah bahawa adalah tidak adil untuk memberi perintah yang membenarkan keseluruhan relif yang dipohon plaintif di peringkat interlokutori, mengatakan bahawa mahkamah tidak boleh dihalang dari memberikan injunksi interlokutori walaupun ia secara berkesannya membenarkan keseluruhan relif yang hendak dipohon oleh pemohon di peringkat perbicaraan penuh, sekiranya ia dibuat atas imbangan keselesaan. Sekiranya jelas bahawa tidak ada pembelaan kepada tindakan, dan tujuan membangkitkan pembelaan hanyalah untuk melambat-lambatkan kes, maka injunksi harus diberi walaupun ia membenarkan keseluruhan remedi kepada pemohon sebelum perbicaraan.

(5) Setelah mempertimbang dengan teliti fakta-takta dan keterangan objektif di sini, adalah diputuskan bahawa ini merupakan kes di mana tidak ada tribunal yang munasabah yang mengarahkan dirinya dengan betul berkaitan fakta serta undang-undang yang terpakai akan membuat perintah-perintah yang dibuat oleh Mahkamah Tinggi dalam rayuan-rayuan di sini.

[Injunksi yang dibenarkan pada 5 Oktober 2005 dalam Rayuan Sivil W-02-1070-05 dilupuskan dengan serta merta; Bagi Rayuan Sivil W-02-1095-05, permohonan dibenarkan menurut terma prayer (a) saman dalam kamar bertarikh 21 September 2005 dengan syarat-syarat biasa mengenai gantirugi.]

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***
Byng v. London Life Association [1989] BCLC 400 ***(foll)***
Cayne & Anor v. Global Natural Resources plc [1984] 1 All ER 225 ***(refd)***
Collings Hui Sdn Bhd v. United Estate Projects Bhd & Anor [1988] 3 MLJ 234 ***(refd)***
Fellowes v. Fisher [1975] 2 All ER 829 ***(refd)***
Garden Cottage Foods Limited v. Milk Marketing Board [1984] AC 130 ***(refd)***
Gibb & Co v. Malaysia Building Society Bhd [1982] CLJ 185; [1982] CLJ (Rep) 99 FC ***(foll)***
Gopal Narayan Kulkarni v. Sanmukhappa Ningappa Angapi [1927] 29 Bom LR 1235 ***(foll)***
John v. Rees [1970] Ch 345 ***(refd)***
Lian Keow Sdn Bhd v. Overseas Credit Finance (M) Bhd [1982] CLJ 350; [1982] CLJ (Rep) 182 FC ***(refd)***
National Dwellings Society v. Sykes [1894] 3 Ch 159 ***(refd)***
NWL Ltd v. Woods [1979] 3 All ER 614 ***(refd)***
Shepherd Homes Ltd v. Sandham [1971] Ch 340 ***(refd)***
Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd [1979] 1 MLJ 150 ***(refd)***
Wakefield v. Duke of Buccleugh [1865] LT 628 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 145

(Civil Appeal W-02-1070-2005)

For the appellants - Logan Sabapathy (Rizal Zulkeply & PY Liew with him); M/s Rizal & Co
For the respondents - Malik Imtiaz Sarwar (Mathew Thomas Philip & Ang Hean Leng with him); M/s Thomas Philip

(Civil Appeal W-02-1095-2005)

For the appellants - Logan Sabapathy (Rizal Zulkeply, PY Liew & Maidzuara Mohammed with him); M/s Rizal & Co
For the 1st, 5th-7th respondents - Azhar Azizan Harun (Abdullah Abdul Rahman with him); M/s Cheang & Ariff
For the 2nd-4th respondents - S Suhendran; M/s Kadir, Andri & Partners
For the 8th respondent - Tay Hong Huat; M/s Tay & Helen Wong

[Appeal from High Court, Kuala Lumpur; Suit No: D7-22-1386-2005]

Reported by Suresh Nathan

JUDGMENT
(Oral)

Gopal Sri Ram JCA (delivering judgment):

[1] This is the judgment of the court.

[2] There are two appeals before us. They are Civil Appeals W-02-1070-05 and W-02-1095-05. Civil Appeal W-02-1070-05 is directed against the decision of the High Court granting an injunction for the respondents in the following terms:

> that until the declaration of the result of the Poll pursuant to Article 74 of the Articles of Association of the 1st Plaintiff (QSR Brands Berhad):
>
> 1. that the 1st to 5th Defendants (the Appellants in Civil Appeal 1070-05), jointly and severally, by themselves, their servants, agents, nominees or howsoever otherwise, be restrained and an injunction do hereby issue restraining the 1st to 5th Defendants, jointly and severally, by themselves, their servants, agents, nominees or howsoever otherwise, from giving effect to and/or implementing and/or acting and/or causing to give effect to and/or causing to be implemented and/or causing to act upon any and all purported resolutions passed, including without limitation the resolutions pertaining to the removal of the 9 directors, at the purported Extraordinary General Meeting ('the Purported EGM') of QSR Brands Berhad ('QSR') held on 20.9.2005 as purportedly chaired by the 1st Defendant.
>
> 2. that the 1st to 5th Defendants, jointly and severally, by themselves, their servants, agents, nominees or howsoever otherwise, be restrained and an injunction do hereby issue restraining the 1st to 5th Defendants, jointly and severally, by themselves, their servants, agents, nominees or howsoever otherwise, from acting and/or representing and/or holding out themselves out and/or causing to act and/or causing to be represented and/or causing to hold themselves out as the only directors of QSR.
>
> 3. that the 1st to 5th Defendants, jointly and severally, by themselves, their servants, agents, nominees or howsoever otherwise, be restrained and an injunction do hereby issue restraining the 1st to 5th Defendants, jointly and severally, by themselves, their servants, agents, nominees or howsoever otherwise, from giving effect to and/or

implementing and/or acting and/or causing to give effect to and/or causing to be implemented and/or causing to act upon any and all further resolutions passed and/or decision made subsequent to the Purported EGM.

[3] Civil Appeal W-02-1095-05 is directed against the refusal of the High Court to grant an injunction prayed for in the following terms:

a) that the Defendants [the Respondents in Civil Appeal 1095-05] be restrained, whether by himself or by his servant or agents or otherwise howsoever, from acting or holding himself out as Chairman and/or directors of the 1st Plaintiff [QSR], and from otherwise intermeddling or interfering in QSR's business or management's affairs until the final disposal of this Originating Summons;

b) that the Poll Forms of the Extraordinary General Meeting on 20/9/2005 ('EGM'), which are sealed in a box and in the custody of an official of the EGM, Ms Seow Fei San, be brought to the Court and be opened by the Deputy Registrar and be photocopied for the purpose of all proceedings in this Originating Summons;

c) such further order or other relief as this Honourable Court deems fit.

[4] Arguments on both appeals were heard on 2 and 3 May 2006 and at the conclusion of submissions by learned counsel, we reserved judgment to this afternoon. These appeals have not only been argued exhaustively; they have been argued to the point of exhaustion: our exhaustion. But there is really only one point which is common to these appeals. We will discuss that point later in this judgment for we must first narrate the facts. Here they are.

[5] QSR Brands Berhad ("QSR") is a public listed company. On 22 August 2005 a special notice of a resolution moved pursuant to s. 145 of the Companies Act 1965 was given by requisitionists. The resolutions sought to be moved at the meeting which was scheduled to be held on 20 September 2005 were as follows:

Ordinary Resolution No. 1 – Removal of Director

That Tan Sri Dato' Nik Ibrahim Kamil bin Tan Sri Ahmad Kamil be and is hereby removed as director of the Company with immediate effect.

A Ordinary Resolution No. 2 – Removal of Director

That Sarbjit Singh a/l Sarban Singh be and is hereby removed as director of the Company with immediate effect.

Ordinary Resolution No. 3 – Removal of Director

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That Yoong Nim Chor be and is hereby removed as director of the Company with immediate effect.

Ordinary Resolution No. 4 – Removal of Director

C That Choong Show Tong be and is hereby removed as director of the Company with immediate effect.

Ordinary Resolution No. 5 – Removal of Director

That Mohd. Harris bin Pardi be and is hereby removed as
D director of the Company with immediate effect.

Ordinary Resolution No. 6 – Removal of Director

That Nurolamin bin Abas be and is hereby removed as director of the Company with immediate effect.

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Ordinary Resolution No. 7 – Removal of Director

That Umar bin Abdul Hamid be and is hereby removed as director of the Company with immediate effect.

Ordinary Resolution No. 8 – Removal of Director

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That Y Bhg Datuk Haji Izhar bin Sulaiman be and is hereby removed as director of the Company with immediate effect.

Ordinary Resolution No. 9 – Removal of Director

G That YAM Dato' Seri DiRaja Syed Razlan ibni Almarhum Tuanku Syed Putra Jamalullail be and is hereby removed as director of the Company with immediate effect.

Ordinary Resolution No. 10 – Removal of Director

H That any such persons as might have been appointed as directors of the Company at any time or times between 29th July 2005 and the conclusion of ordinary resolution 9 above be and are hereby removed as Directors of the Company with immediate effect.

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[6] A meeting was held as per the notice on the date aforesaid. The third respondent in Civil Appeal W-02-1070-05 was appointed Chairman of that meeting. It is a fair inference that all present knew the terms of the resolutions that were being moved. In particular the third respondent in Civil Appeal W-02-1070-05 must have known about the proposed resolution seeking his removal as a director of QSR. At the meeting a poll was demanded and granted. Counting of the votes took place. According to the evidence of the third respondent in Civil Appeal W-02-1070-05 who is also the first respondent in Civil Appeal W-02-1095-05, this is what happened at that meeting. And we quote from his affidavit, which is as follows:

> 40. Well before any voting on resolutions took place during the Wisdom EGM, four persons from the floor were unanimously appointed 4 scrutineers for the purpose of the conducting, counting and tallying up of votes for the polls to be taken.
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> 41. The share registrar and staff involved in the polling were from Epsilon Share Registration Sdn Bhd ('Epsilon').
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> 42. After votes had been cast, at around 11.30 a.m., Ronald Menon, one of the scrutineers, approached me, as Chairman of the meeting, and the 2nd Defendant, as the Company Secretary, to resolve and to ask me to rule on the validity of 2 polling forms, both signed by me at the request of Epsilon ('the Disputed Polling Forms').
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> 42.1 The Disputed Forms were called into question as they were signed by a person (me) whose name did not appear on the attendance sheet for the Wisdom EGM ('the Attendance Sheet').
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> 42.2 This issue was of concern as I was informed by the scrutineers who met me that, earlier, 2 of the scrutineers had insisted that the Disputed Polling Forms be rejected (ie, disqualified) because the signatories of those forms had not signed the Attendance Sheet.
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> 43. After consulting the Company Secretary, I then mentioned to the scrutineers who met me that I would require the benefit of proper legal advice since I felt that the results could be affected and there is the significant risk of litigation, whichever way I ruled. Accordingly, the (sic) I mentioned to the scrutineers who met me that in order to afford me the benefit of such legal advice, I was inclined to adjourn the Wisdom EGM pursuant to Article 74 of the 1st Plaintiff's Articles of Association ('Article 74'). The scrutineers accepted this.

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46. Therefore, I took the view that unlike an adjournment under Article 72, under Article 74 I could adjourn the Wisdom EGM for the purpose of declaring the result of the poll and this did not require a direction by the meeting.

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47. At this juncture, an informal discussion was held with En. Zainal Abidin, who represented Kulim (Malaysia) Berhad (who holds the single largest block of shares in the 1st Plaintiff of about 30%). En. Zainal Abidin, on studying Article 74, felt that it was the call of the Chairman of the Wisdom EGM whether or not to adjourn the meeting.

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48. The 2nd Defendant then ordered Miss Seow Fei San of Epsilon to place all the polling forms in boxes and to seal the boxes (except for the Disputed Polling Forms, which were kept outside the boxes for the purpose of me obtaining a legal opinion subsequently). The boxes were sealed in the presence of all the scrutineers. They were then handed into the custody of Miss Seow Fei San of Epsilon, on terms that they were to be properly and safely kept sealed, and opened only on instruction of the Chairman of the reconvened Wisdom EGM.

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49. At around 12 noon, I explained to the Wisdom EGM the situation and that therefore I exercised my powers under Article 74 of the 1st Plaintiff's Articles to adjourn the meeting to 11 October 2005, 10.00 am at 3rd Floor, Wisma KFC. During the time that I was speaking, one of the scrutineers (whom I am told was one Ms. Lee Noushi) tried repeatedly but unsuccessfully to interrupt me by shouting into a floor microphone what she considered to be the 'results' of the poll. I stood my ground, adjourned the Wisdom EGM and left.

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G **[7]** The upshot was that the meeting was adjourned by the third respondent in Civil Appeal W-02-1070-05. The undisputed evidence shows that the meeting then proceeded, conducted by those remaining behind. Results were announced and the resolutions were carried. In effect all the respondents in Civil

H Appeal W-02-1095-05 were removed as directors. The next thing that happened was that proceedings were filed by both sides of the dispute that are now before us. The first proceedings was an originating summons filed by the appellants in both appeals seeking the following relief:

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a) that the Defendants (the Respondents in Civil Appeal 1095-05) be restrained, whether by himself or by his servant or agents or otherwise howsoever, from acting or holding himself out as Chairman and/or directors of the Plaintiffs (QSR), and from otherwise intermeddling or interfering in the Plaintiffs' Company's business or management's affairs;

b) costs to be borne by the Defendants;

c) such further order or other relief as this Honourable Court deems fit; and for the damages to be assessed by this Honourable Court;

d) such further order or other relief as this Honourable Court deems fit.

[8] A day later, QSR and two other plaintiffs, including the third respondent in Civil Appeal W-02-1070-05 caused a writ to be issued praying for a declaration that the adjournment was valid and for consequential relief. On 21 September 2005 the appellants in both appeals moved for an injunction in the terms mentioned earlier. Simultaneously, the respondents in Civil Appeal W-02-1070-05 also moved for an injunction in the terms we have set out. Both applications came before the learned judge who on 5 October 2005 granted the orders sought by the respondents in W-02-1070-05 and dismissed the orders sought by the appellants in Civil Appeal W-02-1095-05.

[9] The issue common to both appeals before us is whether the decision by the third respondent in Civil Appeal W-02-1070-05 to adjourn the meeting was valid. If it was, then it follows that the meeting that continued was unlawful and the resolutions thereat were improperly carried. It also follows that the learned judge was correct in granting the injunction aforesaid. Before we deal with the sole issue in this case, we must mention for completeness that a meeting of QSR was held on 11 October 2005, claimed by the respondents in Civil Appeal W-02-1070-05 to be a continuance of the adjourned meeting.

[10] In order to resolve the issue at hand, it is necessary to hearken to two of the articles of association of QSR. They are arts. 72 and 74. They read as follows:

72. The Chairman may, with the consent of the meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and place to place but no business shall be transacted at an adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for thirty (30) days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting. The Exchange shall be duly informed of every adjournment and the reasons for each adjournment.

74. If a poll is duly demanded it shall be taken in such manner (including the use of ballot or voting papers or tickets) and either at once or after an interval or adjournment or otherwise as the Chairman directs, and the result of the poll shall be the resolution of the meeting at which the poll was demanded, but a poll demanded on the election of Chairman or on a question of adjournment shall be taken forthwith. The demand for a poll shall not prevent the continuance of a meeting for the transaction of any business other than the question on which the poll has been demanded. The Chairman of the meeting may (and if so directed by the meeting shall) appoint scrutineers and may, in addition to the powers of adjourning meetings contained in Article 72, adjourn the meeting to some place and time fixed for the purpose of declaring the result of the poll.

[11] Article 72 does not apply to this case because the third respondent in Civil Appeal W-02-1070-05 (whom we shall refer hereto as the third respondent) did not seek the consent of the meeting to adjourn it. That leaves us with art. 74. In our judgment the critical words in that article are "adjourn the meeting to some place and time fixed for the purpose of declaring the result of the poll". Looking at the affidavit evidence presented to the learned judge and read to us at length by counsel on both sides, it is a fair inference – indeed we would say that it is an inference warranted by the facts – that the third respondent did not adjourn the meeting for the purpose of declaring the result of the poll that had been conducted.

[12] As may be gathered from the affidavit evidence already quoted, the quarrel or uncertainty about the defective proxies was *de minimis*. The votes relating to the disputed proxies, and it is common ground, would not have affected the final result. That

being the case, the third respondent's assertion that he acted under art. 74 cannot hold water. We therefore conclude, as we must, that he was exercising his common law power of adjournment which he of course had as chairman of the meeting.

[13] The correct approach to determine whether the common law power of adjournment has been properly exercised in a given case is that set out by the English Court of Appeal in *Byng v. London Life Association* [1989] BCLC 400. In that case, Browne-Wilkinson V-C said this:

> The starting point is to consider the nature of the residual power to adjourn which in my judgment remains vested in the chairman. It was a residual power exercisable only when the machinery provided by the articles had broken down. This residual common law power is itself tightly circumscribed by reference to the objects for which it exists. I quote again from the passages which I have emphasised above in the quotations from *R v. D'Oyly* ([1840] 113 ER 139) and Mr Rogers's book ((*Rogers A Practical Arrangement of Ecclesiastical Law* [1840]). The power is to regulate proceedings 'so as to give all persons entitled a reasonable opportunity of voting'. The chairman must 'do the acts necessary for those purposes'. The power to adjourn is only validly exercised if 'no injurious effect were produced'. I would add that at a company meeting a member is entitled not only to vote but also to hear and be heard in the debate. Therefore it is the very purpose of the power to facilitate the presence of those entitled to debate and vote on a resolution at a meeting where such debate and voting is possible. To my mind, this is inconsistent with the view that the exercise of the power can only be impugned on the grounds of lack of good faith. In my judgment the chairman's decision must also be taken reasonably with a view to facilitating the purpose for which the power exists. Accordingly, the impact of the proposed adjournment on those seeking to attend the original meeting and the other members must be a central factor in considering the validity of the chairman's decision to adjourn.
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> The quotation from *Rogers* might suggest that if the chairman's decision proves in the event to have an adverse effect on the members, that will render the decision invalid. In my judgment that is not the correct test. The chairman's decision will not be declared invalid unless on the facts which he knew or ought to have known he failed to take into account all the relevant factors, took into account irrelevant factors or reached a conclusion which no reasonable chairman, properly directing himself as to his duties, could have reached, ie the test is the same as that applicable on

judicial review in accordance with the principles of *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223. This was the approach adopted by Uthwatt J in *Second Consolidated Trust Ltd v. Ceylon Amalgamated Tea and Rubber Estates Ltd* [1943] 2 All ER 567, where he held a chairman's decision invalid on the grounds that he had failed to take into account a relevant factor.

[14] Turning now to the evidence once again, it is quite apparent that the third respondent failed to take into account relevant considerations. In particular, he should have but did not ask himself the question whether the two defective forms he was shown by the scrutineers would have made a difference on the vote upon the resolutions before the meeting. There is one further point. The third respondent had an interest in at least one of the resolutions, namely that which sought his removal. In these circumstances, we are unable to distance ourselves from the impression that the decision to adjourn was unreasonable in the sense explained in *Byng*.

[15] What then of the meeting that continued? The answer to that question was given as long ago as 1927. It was in the case of *Gopal Narayan Kulkarni v. Sanmukhappa Ningappa Angapi* [1927] 29 Bom. LR 1235 where Marten CJ said this:

> The question seems to me, therefore, to be one entirely different from that in *The King v. Gaborian* [1809] 11 East 77, where the presiding officer, *viz.*, the mayor and also two aldermen and several burgesses left the meeting without any objection, and it was not until after that had been done that certain persons who remained in the room purported to make a new election. On the other hand in *National Dwellings Society v. Sykes* [1894] 3 Ch. 159 Mr. Justice Chitty held (p. 162) that it is the duty of a chairman to preserve order, conduct proceedings regularly, and take care that the sense of the meeting is properly ascertained with regard to any question before it; but he has no power to stop or adjourn a meeting at his own will; and if he purports to do so, it is competent for the meeting to resolve to go on with the business for which it has been convened, and to appoint another chairman for that object. Counsel for the appellants says that in that case the meeting had begun and that a particular resolution had been passed. Let that be so. To my mind it makes no essential difference whether the chairman illegally and at once declared the validly called meeting dissolved, or whether he waited till one or two or three resolutions had been passed, and then made an announcement before all the business for which the meeting has been called had been concluded.

[16] In *John v. Rees* [1970] Ch 345 Megarry J said "On the footing that there was no valid adjournment, it follows that, as the cases establish (see for example, *National Dwellings Society v. Sykes* [1894] 3 Ch 159) and as counsel for the plaintiff concedes, the meeting remained in being and competent to transact business. The elections conducted after the departure of the plaintiff were accordingly valid". A B

[17] So too here. The third respondent's decision to adjourn being invalid, it follows that the continuation of the meeting by the requisitionists was competent and that the business transacted thereat was valid. C

[18] In meeting the appellants' case, it was argued by learned counsel for the second to fourth respondents in Civil Appeal W-02-1095-05 that it would be unjust for this Court to set aside the injunction obtained by respondents in Civil Appeal W-02-1070-05 and to grant the injunction to the appellants in Civil Appeal W-02-1095-05. In support of his argument, Mr. Suhendran of counsel referred us to a decision of the Court of Appeal in *Cayne & Anor v. Global Natural Resources plc* [1984] 1 All ER 225 and to the speech of Lord Diplock in *NWL Ltd v. Woods* [1979] 3 All ER 614. We were also referred to *Collings Hui Sdn Bhd v. United Estate Projects Bhd & Anor* [1988] 3 MLJ 234 where at p. 236, VC George J (as he then was) said: D E

> Certainly where the plaintiffs' case is so open and shut that any trial of the issues would simply be a formality, I agree that the court need not apply *American Cyanamid* [1975] 1 All ER 504 but can grant the injunction sought without further ado. In *Cayne & Anor v. Global Natural Resources plc* [1984] 1 All ER 225, May LJ put it in this way at p 238f: F G
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> There may be cases where the plaintiff's evidence is so strong that to refuse an injunction and to allow the case to go through to trial would be an unnecessary waste of time and expense and indeed do an overwhelming injustice to the plaintiff. But those cases would, in my judgment, be exceptional. H

[19] With respect it is our view that the learned judge in *Collings Hui Sdn Bhd* misunderstood the decision in *Cayne*. In our judgment the effect of *Cayne v. Global Resources* and *NWL Ltd v. Woods* is simply this. In the ordinary case of an application for an interim injunction, whether mandatory or prohibitory, the test is I

whether there is a serious question to be tried. If there is, and no injustice would be occasioned by the grant of the injunction then the balance of convenience would ordinarily lie in favour of the grant of the injunction. This in reality is a paraphrase of Lord Diplock's seminal dictum in *American Cyanamid*. However, cases, though rare, may arise where the grant or refusal of an injunction would terminate the litigation one way or the other. In such cases, the American Cyanamid test of "serious question to be tried" does not apply. The plaintiff seeking an injunction in those circumstances must satisfy a higher threshold. This is sometimes referred to as a *prima facie* case (see *Fellowes v. Fisher* [1975] 2 All ER 829) or a strong "*prima facie* case" (*Wakefield v. Duke of Buccleugh* [1865] LT 628, 629; *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396) or "an unusually sharp and clear case" (*Shepherd Homes Ltd v. Sandham* [1971] Ch 340; *Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150). Whether a high degree of assurance is felt by a court in a case falling outside the American Cyanamid test depends on the facts and circumstances of each case. The stronger, the more credible, the evidence, the greater the assurance that will be felt. And that is indeed the position here on the instant facts. We are therefore unable to agree with Mr. Suhendran of counsel that it would be unjust for us to reverse the learned judge in the two appeals before this court based on the facts of this case.

[20] The other point taken is that if we allow these appeals it would mean granting the appellants the whole of the relief they have claimed. But that is not unusual. It has happened before. In *Gibb & Co. v. Malaysia Building Society Bhd.* [1982] CLJ 185; [1982] CLJ (Rep) 99, 273, Abdoolcader J when repelling a submission that it would be unjust to grant an order that would virtually give the plaintiff the full relief sought for at the interlocutory level said this:

> The short answer to the issue raised in this respect is that the court is not precluded from granting an interlocutory injunction where this would virtually give the applicant therefore on his claim the full relief actually sought to be secured at the final hearing when the matter is viewed on a balance of convenience (*Woodford v. Smith* [1970] 1 WLR 806, 817, 818 (at pages 817-818); Wah Loong (Jelapang) Tin Mine [1975] 2 MLJ 109, 114 (at page 114); Sivaperuman [1979] 1 MLJ 150). If there is plainly no defence to the action, and the only object in raising a defence is

delay, an injunction should be issued even if it gives the applicant his whole remedy before the trial (*Manchester Corporation v. Connolly* [1970] 1 Ch 420, 427 (at page 427). In *Bryanston Finance Ltd v. De Vries (No 2)* [1976] 1 Ch 63, 76, 81, Buckley LJ, said (at page 76) that in relation to a petition for the winding-up of a company, the action (for an injunction to restrain the petitioner from petitioning for winding-up) as a whole is in the nature of an interlocutory proceeding. The court in that case held that the company was only entitled to interlocutory relief if on the available evidence it could be said that presentation of a petition would *prima facie* be an abuse of process, and Sir John Pennycuick said (at page 81):

> The decision in the *American Cyanamid Case* [1975] AC 396 was, as I understand it, addressed to interlocutory motions in the sense of motions seeking interim relief pending determination of the rights of the parties at the hearing of the action ... I do not think the decision should be read as applicable to motions which, though interlocutory in form, seek relief which will finally determine the issue in the action ... .

This is in effect a judicial acknowledgement on the lines of the observation by Lord Denning MR, in *Fellowes & Son v. Fisher* [1976] QB 122, 129 (at page 129) that an interlocutory decision is often for all practical purposes final, and indeed Lord Diplock in his judgment in the House of Lords in *N.W.L. Ltd v. Woods* [1979] 1 WLR 1294, 1306 (at page 1306) spoke to the same effect in discussing the decision of the House in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396.

These words apply with force to the facts of this case.

[21] In the course of argument we were reminded quite correctly by learned counsel for the respondents in both appeals that we were dealing with discretionary appeals before us. We are conscious of this. We are also conscious of the limited role we play in discretionary appeals, that is to say, appeals against discretionary orders. Our role has been summed up by Lord Diplock in *Garden Cottage Foods Limited v. Milk Marketing Board* [1984] AC 130. This is how he put it:

> [O]n an appeal from the judge's grant or refusal of an interlocutory injunction, an appellate court including your Lordships' House, must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the

A discretion differently. The function of an appellate court is initially that of review only. It is entitled to exercise an original discretion of its own only when it has come to the conclusion that the judge's exercise of his discretion was based on some misunderstanding of the law or of the evidence before him, or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own.

[22] The same caution was administered by the Federal Court unto itself in *Lian Keow Sdn Bhd v. Overseas Credit Finance (M) Bhd* [1982] CLJ 350; [1982] CLJ (Rep) 182 where Salleh Abas FJ said this:

> Although the function of an appellate court with regard to the exercise of discretion by a judge in granting or refusing an interlocutory injunction is one of review only and we must defer to the judge's decision in the matter, we however feel justified in this case in overruling the decision of the court below because we are of the opinion that the learned judge's exercise of discretion in setting aside the interlocutory injunction and order previously made by Anuar J was based upon a misunderstanding of the law and the facts before him (see Lord Diplock in *Hadmor Productions Ltd & Ors v. Hamilton & Anor* [1982] 2 WLR 322, 325). Such misunderstanding led him to take into consideration questions which ought not to be considered as they are not justified by the facts in this case.

[23] In the present case, there are no reasons at all given by the learned judge. There are not even "sketchy grounds" referred to by Lord Diplock in *Garden Cottage*. So there is clearly a very wide ambit for us in point of discretion. What discretion could be possibly interfered with when no reasons at all have been given for its exercise. Put in that way, we feel that we are more advantaged than the Federal Court in *Lian Keow*.

[24] We have very carefully considered the objective facts in this case. We have anxiously scrutinized the evidence. Having done so, we have come to the conclusion that this is a case in which no reasonable tribunal properly directing itself on the facts and applicable law would have made the orders that were made by the High Court in these appeals.

[25] For the reasons already given, the injunction granted on 5 October 2005 in Civil Appeal W-02-1070-05 is hereby dissolved forthwith. There shall be an inquiry into the damages suffered by the appellants in consequence of that injunction, pursuant to the undertaking upon which that injunction was granted. In Civil Appeal W-02-1095-05, there shall be an order in terms of prayer (a) of summons in chambers dated 21 September 2005 upon the usual undertaking as to damages. The appellants shall have the costs for both appeals as well as costs incurred in the court below. Insofar as costs in Civil Appeal W-02-1070-05 are concerned, these shall be taxed against the second and third respondents only and be paid by them. Deposit to be refunded to the appellants.